C.R.No.173/06

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR

S.B. CIVIL REVISION PETITION NO.173/2006

Navab Ali

Vs.

Abdul Hamid & Ors.

DATE OF ORDER :: 16/11/2006

HON'BLE MR. JUSTICE AJAY RASTOGI

Mr. Satish Khandal, for petitioner-plaintiff

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Instant revision petition has been filed by the petitioner-plaintiff against the order dated 2nd August, 2006 whereby the application filed by the defendants-respondents against the ex-parte decree under O.9 R.13 CPC was allowed under the order impugned.

Plaintiff-petitioner filed a suit for permanent injunction for alleged strip of land on 22nd February, 2002 which is between the premise of plaintiff and defendants-respondents and injunction has been sought against the defendants. After service of notice, the defendants-respondents filed written statement, but they could not put their presence in the proceedings, thereafter, as such the order was passed to initiate ex-parte proceedings against them vide order dated 10th February, 2004. As a consequence thereof, the ex-parte decree was passed on 13th August, 2004. When the notice for execution of ex-parte decree was served, the defendants-respondents filed application under O.9 R.13 CPC for setting aside the ex-parte decree.

Learned trial Judge rejected the application filed by the defendants-respondents under O.9 R.13 CPC vide order dated 5th July, 2006. But, the learned First Appellate Court being satisfied with the explanation furnished for delay in filing of the application under O.9 R.13 CPC allowed the appeal and set aside the ex-parte decree on payment of cost of Rs.2,000/- and remanded the matter to be adjudicated by the trial court in accordance with law vide order dated 2nd August, 2006. Hence, this revision petition.

Counsel for petitioner vehemently contends that the explanation, which has been noticed by the First Appellate Court with regard to members of family of defendant-respondent being suffering from tuberculosis and his daughter also died during pendency, no documentary evidence has been placed on record. As such the finding, which has been recorded accepting the explanation furnished by the defendants-respondents, is not legally sustainable and in support of his contention counsel has placed reliance on the judgment of this court reported in 1995(1) WLC 764 where this court was not satisfied to condone the delay of 237 days in filing the appeal.

I have considered the submission of the counsel and perused the finding recorded under the order impugned.

Learned First Appellate Court has considered the suffering of family of the defendant-respondent and his daughter also died and looking to economic &

financial condition, all were noticed while accepting his explanation furnished for delay in filing of application under O.9 R.13 CPC and apart from it, it has also been considered that looking to the nature of dispute, which has been raised by the plaintiff-petitioner, certainly adjudication of the dispute is required despite the fact that the written statement was submitted by the defendants-respondents within time provided under the provisions of CPC.

I do not find any error committed by the learned First Appellate Court in exercising its discretion in condoning the delay for filing of application and even otherwise the application was allowed on payment of cost of Rs.2,000/-, certainly that will meet out the cause/grievance of the petitioner and this fact can also not be ruled out that the present suit was instituted by the petitioner in February, 2002 delay cannot be attributed for adjudication of the dispute upon defendant only.

Consequently, the present revision petition fails and is hereby dismissed.

[AJAY RASTOGI],J.

FRBOHRA,JR.P.A.